SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2020] SC GLA 4

F670-15

JUDGMENT OF SHERIFF AISHA Y ANWAR

in the cause

ALAN PEBERDY

Pursuer

against

MEGHANE YOUNG or PEBERDY

Defender

Pursuer: Smith; Complete Clarity Solicitors
Defender: Party Litigant

Glasgow, 3 January 2020

The sheriff, having resumed consideration of the cause, makes the following FINDINGS IN FACT:

(1) The parties were married on 9 August 2006.

(2) There are no children of the marriage.

(3) The parties separated in or around August 2012. The pursuer moved out of the matrimonial home at Riddrie, Glasgow ("the property") in or around August 2012. The parties have not cohabited since. The defender continued to reside in the property.

(4) The parties jointly own the property. The property was purchased on 1 December 2008. The purchase was funded *inter alia* by way of a secured loan from the Royal Bank of Scotland in the parties' joint names.

(5) The pursuer continued to make monthly payments in respect of the mortgage from August 2012 until July 2014. During that period, the pursuer paid the sum of £14,242.98. Subsequent to these payments, the parties' mortgage account was in arrears. The Royal Bank of Scotland commenced proceedings against the parties for repossession of the property in 2015.

(6) The pursuer raised these proceedings in July 2015 seeking *inter alia* divorce and financial provisions upon divorce. The defender counterclaimed, seeking financial provisions.

(7) The matrimonial assets as at August 2012 comprised:

(i) the property which had a value of around £140,000

(ii) the contents of the property valued at approximately £10,000 and

(iii) the pursuer's pension which had an apportioned value of £28,638.70 for the period of the parties' marriage.

(8) The matrimonial liabilities as at August 2012 comprised:

(i) the outstanding balance of the mortgage on the property

(ii) the outstanding balance of £6,941.42 on a loan obtained by the pursuer from his employer to fund the purchase of the property

(iii) the outstanding balance of £14,345.55 on a loan obtained by the pursuer from Lloyds Bank to fund the purchase of the property and

(iv) council tax arrears in respect of the property in the sum of approximately £5,500.

(9) The parties entered into a Minute of Agreement regulating their financial matters ("the Agreement"). The Agreement was signed by the defender on 26 November 2015, by

the pursuer on 10 December 2015 and was registered in the Books of Council and Session for preservation and execution on 7 January 2016.

(10) A proof diet which had been due to commence on 26 November 2015 was discharged. The parties were represented by solicitors at the proof diet. The court made no further order to allow the terms of the Agreement to be implemented.

(11) In terms of the Agreement the parties agreed *inter alia* the following matters:

(i) that the property would be placed on the mortgage to rent scheme and that the pursuer would fully cooperate with all that was required of him in order to advance the defender's application in that regard;

(ii) that in the event that the property had not been accepted to the mortgage to rent scheme by 15 March 2016, it would be placed on the open market for sale, with both parties agreeing to undertake to cooperate fully with and to facilitate the sale, including by allowing access to the property;

(iii) that from the net free proceeds of sale (a) all reasonably incurred and necessary legal expenses (b) the sum required to redeem the secured loan with the Royal Bank of Scotland in the parties' joint name (c) the sums required to repay any outstanding council tax arrears as at August 2012 and (d) the sums required to pay any vouched arrears in respect of utilities as at August 2012, would be deducted. Thereafter, the net proceeds of sale would be divided equally between the parties;

(iv) that the property would be placed on the open market at a price as recommended in a home report; that no reasonable offer for the property would be refused; that the parties would regard an offer of the amount specified in the home report as a reasonable offer, or an offer determined to be a reasonable offer by an independent estate agent or solicitor, being no being less than £125,000, to be a reasonable offer;

(v) that during the period of occupation by the defender of the property pending its sale, she would be responsible for sums due under any policy of insurance, council tax and services, would maintain the home in its present condition and that neither party would increase the borrowing in relation to the property.

(12) In terms of clause 10, the parties acknowledged that in reaching the terms of the Agreement, they had had the benefit of separate legal advice and that the terms of settlement "are fair and reasonable".

(13) In terms of clause 8 of the Agreement, the defender agreed to withdraw her defence to these proceedings and to allow the action to proceed as undefended in relation to the pursuer's crave for divorce. The defender has not withdrawn her defences.

(14) The secured lenders took no further action pending the defender's application under the mortgage to rent scheme.

(15) The property was not accepted to the mortgage to rent scheme by 15 March 2016.

(16) Decree in the action at the instance of the secured lender was granted on or around 2 September 2016. The pursuer had consented to decree. Decree was superseded for 2 months to allow the defender to vacate the property. That decree has not been enforced.

(17) The defender, with the assistance of her father, entered into a payment plan for the mortgage arrears. The pursuer was not consulted or advised that arrangements had been made for the defender to continue to occupy the property subject to the same mortgage. The defender continues to pay £684 monthly to the Royal Bank of Scotland in respect of monthly mortgage repayments. The defender has paid £17,754 in respect of mortgage repayments and payment plans with the Royal Bank of Scotland.

(18) On 20 June 2017, the court ordained the defender to implement her obligations in terms of the Agreement.

(19) On 9 February 2018, the pursuer lodged a minute of contempt in respect of the defender's alleged failure to comply with the order of 20 June 2017.

(20) An evidential hearing on the pursuer's minute took place on 7 June 2018. Sheriff Mackinnon did not find it established beyond reasonable doubt that the defender had failed to comply with the interlocutor of 20 June 2017 wilfully or with an inexcusable degree of carelessness. At paragraph [35] of his judgment, Sheriff Mackinnon stated:

> "It may be of assistance to parties if I were now to make clear that going forward, the respondent must indeed obtemper Sheriff Anwar's order. The minute of agreement has not been revisited and Sheriff Anwar's order has not been appealed. It must be obtempered. Were the respondent now to fail to obtemper the order she would undoubtedly be in contempt of court."

(21) On 13 November 2018, the court granted an incidental order in terms of section 14(2)(a) of the Family Law (Scotland) Act 1985 for the sale of the property, ordained the defender to provide a key for the property to the selling agents with 7 days, ordained the defender to permit access to selling agents, Derek Bell, Clarke Boyle solicitors and any surveyor authorised by the selling agents upon being given 48 hours' notice in order to allow the property to be marketed for sale and made no further order pending the marketing and sale of the property.

(22) A bed sheet was erected near the property on the day of open viewings reading "This community stands with Meghane no forced sale…".

(23) The selling agents appointed by the court on 13 November 2018 withdrew from acting, citing the defender's failure to co-operate with the sales process.

(24) On 5 February 2019, the interlocutor of 13 November 2018 was amended to substitute the name and designation of Derek Bell for that of Nicholas Scullion. Sheriff Alan Miller attached a note to his interlocutor in the following terms:

> "The defender made an impassioned plea to be allowed to buy the pursuer out of the former matrimonial home. However, even at this late stage, she was not able to state that she has the consent of the mortgage lender to do so. Further it is 3 years since the parties signed a minute of agreement in terms of which the property was to be placed on the open market if a mortgage to rent application was not accepted by 15 March 2016. It is more than 18 months since the hearing of 20 June 2017 when the court refused the defender's motion to set aside the minute and ordained her to cooperate in the sale of the property. The court noted on 13 November 2018 that further and more specific orders of court might be required. No further progress has been made since then."

(25) On 17 April 2019, the court ordained the defender to provide to Mr Scullion a full set of keys permitting access to the property within 7 days failing which, the court granted warrant to sheriff officers to enter the property and to search for and take possession of such keys. The court also restricted the occupancy rights of the defender by permitting access to the property by Mr Scullion, his employees or agents, surveyors and prospective purchasers, upon notice.

(26) The defender provided a full set of keys to Mr Scullion in or around May 2019.

(27) The property was marketed for sale by estate agents instructed by Mr Scullion. The estate agents arranged to attend at the property with a surveyor on 3 June 2019 to prepare a home report and marketing materials. As the defender's dogs were within the property, they could not gain entry.

(28) The estate agents and the surveyor gained entry on 10 June 2019.

(29) Mr Scullion provided the defender with a copy of the home report. Notwithstanding the terms of the Agreement he indicated that if the defender were able to make an offer on the property within 10 days, the property would not be marketed. By 21 June 2019, no such offer was received from the defender.

(30) The property was placed on the open market. An offer of £142,000 was accepted by Mr Scullion. Mr Scullion negotiated a late date of entry of 26 September 2019 to allow the

defender time to vacate the property. The defender was provided with mortgage redemption figures and kept appraised of the conveyancing process. She was asked to maintain communications with Mr Scullion to facilitate the sale of the property and to vacate the property within two weeks of the date of entry. The defender failed to do so.

(31) On 25 September 2019, the defender having failed to make arrangements to sign the disposition or vacate the property, Mr Scullion attended at the property. He asked the defender to sign a disposition in favour of the purchasers. She refused to do so. The property could not be sold. The prospective purchasers, acting in good faith and expecting to receive title and vacant possession to the property, had sold their home and required to move into alternative temporary accommodation.

(32) The defender has repeatedly and deliberately sought to obstruct the sale of the property to any third party. She had failed to co-operate with estate agents and solicitors. She has refused to vacate the property. She has refused to grant a disposition of her title. She will continue to do so.

FINDS IN FACT AND LAW

(1) The marriage of the parties has broken down irretrievably as established by the parties' non-cohabitation for a period in excess of two years.

(2) The relevant date, as agreed by the parties, for the purposes of section 10(3)(a) of the Family Law (Scotland) Act 1985 is August 2012.

(3) The parties entered into a Minute of Agreement regulating the sale of the property with the benefit of legal advice.

(4) The defender has wilfully and deliberately refused to implement the terms of the Minute of Agreement by obstructing the sale of the property.

(5) The defender will continue to obstruct the sale of the property if she remains in occupation of the property. The defender has refused and is likely to continue to refuse to sign any disposition transferring her title to the property in terms of the Minute of Agreement. The defender has refused to vacate the property voluntarily. She is likely to continue to refuse to do so.

(6) The incidental orders sought by the defender in terms of sections 8(1)(c), 14(2)(d)(i) and 14(2)(k) of the Family Law (Scotland) Act 1985 being justified by the principles of section 9 of that Act and being reasonable having regard to the resources of the parties, should be granted.

(7) Having regard to the defender's conduct, it is necessary to grant an order regulating her occupancy of the property in terms of section 14(2)(d)(i) of the Family Law (Scotland) Act 1985.

ACCORDINGLY (1) Sustains the pursuer's first and second pleas-in-law; *Quoad Ultra* Repels all other pleas-in-law; (2) Grants decree of divorce, the marriage of the parties having broken down irretrievably as established by the parties' non-cohabitation for a period in excess of two years; and thereafter (3) Grants an incidental order in terms of section 14(2)(d)(i) of the Family Law (Scotland) Act 1985 regulating the occupation of the matrimonial home at Riddrie, Glasgow whereby excludes the defender from such occupation and ordains her to immediately vacate the said matrimonial home together with her whole belongings, pets, furniture and plenishings, and in the event that the defender delays or refuses to do so, grants warrant to sheriff officers to enter the said matrimonial home and summarily eject the defender together with her whole belongings, pets, furniture and plenishings; (4) Grants an incidental order in terms of section 14(2)(k) of the Family Law (Scotland) Act 1985 whereby

ordains the defender to execute and deliver to the purchaser or purchasers of the said matrimonial home such dispositions and other deeds as shall be necessary for constituting full rights thereto and in the event of the defender being unable to be found, refusing or delaying to do so, Grants warrant to the Sheriff Clerk at Glasgow Sheriff Court to execute and deliver to the said purchaser or purchasers said disposition and other deeds in terms of section 5(a) of the Sheriff Court (Scotland) Act 1907; (5) Dismisses the defender's craves as no longer insisted upon; (6) thereafter, on the pursuer's motion, having heard defender's opposition thereto, (i) Finds the defender liable to the pursuer in the expenses of the cause in so far as not already dealt with, from 7 January 2016 as taxed; allows an account thereof to be given in and remits same when lodged to the auditor of court to tax and to report; (ii) Finds the pursuer entitled to an additional fee to reflect the responsibility undertaken by the solicitor in the conduct of the proceedings having regard to factors (i), (v) and (vii) of the Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment and Further Provisions) 1993, Schedule 1 Regulation 5(b), and in terms thereof allows an increase of 10%; (iii) Grants an incidental order in terms of section 14(2)(k) of the Family Law (Scotland) Act 1985 whereby orders that the costs of the aborted sale negotiated by Nicolas Scullion be deducted from the defender's share of the net free proceeds of the sale of the said matrimonial property; Supersedes the issue of an extract decree for a period of six weeks from 3 January 2020.

NOTE:

Introduction, Background and Procedural History

[1] In what ought to have been a fairly straightforward action for divorce and financial provisions, matters have taken an extraordinary turn.

[2] This action commenced in July 2015. The pursuer sought decree of divorce, orders in terms of section 14(2)(a) of the Family Law (Scotland) Act 1985 ("the 1985 Act") for the sale of the matrimonial home ("the property") failing which, payment of a capital sum. The defender counterclaimed and sought payment of a periodical allowance and a capital sum.

[3] A proof was assigned for 26 November 2015. On the morning of the proof, the parties having agreed the terms of a Minute of Agreement ("the Agreement"), the diet was discharged and no further order was made by the court pending the implementation of its terms.

[4] On 9 May 2017, the pursuer's agent moved a Minute of Amendment seeking to amend the Record by insertion of a crave ordaining the defender to implement the Agreement. The pursuer also sought to introduce averments regarding the defender's failure to co-operate in the sale of the property and her failure to provide access to it. The hearing called before me. The defender was unrepresented. I continued the motion to 20 June 2017 to allow the defender an opportunity to obtain legal advice. On 20 June 2017 the defender was represented by a lay representative from the Scottish Woman's Right Centre. Her representative made a motion at the bar to have the Agreement set aside and to have a proof before answer assigned. She was unable to articulate the grounds upon which the Agreement should be set aside beyond stating that the 'defender may have been vulnerable' when she signed it. I explained that in the absence of any craves and corresponding averments seeking to have the Agreement set aside in terms of section 16(1)(b) of the Family Law (Scotland) Act 1985 ('the 1985 Act'), the defender's motion could not be granted and there was no basis for assigning a proof before answer. I allowed the Record to be amended in terms of the pursuer's Minute of Amendment and granted the pursuer's motion ordaining the defender to implement her obligations in terms of the Agreement.

[5] On 9 February 2018, the pursuer lodged a Minute for Contempt. The pursuer sought a finding that the defender was in contempt of court by her failure to adhere to the terms of the interlocutor of 20 June 2017.

[6] An evidential hearing on the pursuer's Minute for Contempt took place in June 2018. Sheriff Mackinnon found that the defender was not in contempt of court. While Sheriff Mackinnon was satisfied that the defender "had a degree of unease" about pursuing a sale using a particular estate agent, he noted that she had also made enquiries with another estate agent and had continued to negotiate with the pursuer with a view to purchasing the matrimonial home herself. However, he also noted at the end of his judgment that;

> "It may be of assistance to parties if I were now to make clear that going forward, the respondent must indeed obtemper Sheriff Anwar's order. The minute of agreement has not been revisited and Sheriff Anwar's order has not been appealed. It must be obtempered. Were the respondent now to fail to obtemper the order she would undoubtedly be in contempt of court."

[7] On 13 November 2018, on the pursuer's opposed motion, Sheriff Mackie granted an incidental order in terms of section 14(2)(a) of the 1985 Act for the sale of the property, granted warrant to Derek Bell, Clark Boyle solicitors to dispose of it, ordained the defender to provide a set of keys to the property within 7 days and ordained the defender to permit access to the property by selling agent and surveyors upon 48 hours notice.

[8] In a note attached to his interlocutor, Sheriff Mackie made the following comments:

> "The said Minute of Agreement was executed by the parties at the end of 2015. On 20 June 2017, the court ordained the defender to implement her obligations in terms of said Minute of Agreement relative to the sale of the heritable property. The property remains unsold at this date. No marketing has taken place. The defender appears to have focussed her attentions on seeking to acquire the pursuer's interest in said heritable property but agreement has not been reached in respect of any such acquisition.
>
> In these circumstances, the parties require to implement the terms of said Minute of Agreement and proceed to sell said heritable property. The defender is opposed to that course of action, as she made clear in her submissions. Accordingly the order

> sought by the pursuer is necessary as are the conditions which the pursuer sought to attach to the order in respect of the provision of a key to said heritable property and in respect of allowing access for selling agents and surveyors."

[9] On 5 February 2019, the case called before Sheriff Miller. On the pursuer's opposed motion, the court varied the order of 13 November 2018 and terms of section 14(2)(k) of the 1985 Act *inter alia* (a) substituted Nicolas Scullion as the solicitor appointed to deal with the sale of the property (b) authorised Mr Scullion to accept an offer to purchase the property, which he, exercising reasonable discretion, considers to be appropriate (c) directed the defender to provide keys to the property to Mr Scullion within 7 days (d) ordained the defender to permit access to Mr Scullion or his agents with prospective purchasers for the purposes of viewings on 24 hours notice (e) found Mr Scullion entitled to deduct all costs and expenses involved in the sale from the net free proceeds and (f) directed that Mr Scullion hold any net free proceeds of sale until further orders of the court.

[10] In a note attached to his interlocutor, Sheriff Miller made the following comments:

> "The defender made an impassioned plea to be allowed to buy the pursuer out of the former matrimonial home. However, even at this late stage, she was unable to state that she has the consent of the mortgage lender to do so. Further, it is three years since the parties signed a Minute of Agreement in terms of which the property was to be placed on the open market if a mortgage to rent application was not accepted by 15 March 2016. It is more than 18 months since the hearing on 20 June 2017 when the court refused the defender's motion to set aside the Minute and ordained her to co-operate in the sale of the property. The court noted on 13 November 2018 that further and more specific orders of court might be required. No further progress has been made since then."

[11] On 28 May 2019, further orders of the court became necessary. The case called before me. Having heard parties in relation to the defender's failure to provide a full set of keys to the property to Mr Scullion, and the defender having confirmed that she would now do so, I continued matters until 5 June 2019 to ensure the defender had done as instructed. On 5 June 2019, the court was advised that the keys had been provided.

[12] On 2 October 2019, having been advised of continuing difficulties with the sale of the property, and a desire on the part of the pursuer to suspend entirely the defender's occupancy rights in relation to the property, I invited the pursuer's agents to amend his craves to set out exactly what orders he sought and to update his pleadings. I allowed the defender, who was unrepresented, time to lodge Answers to allow the court to be fully appraised of her position. I assigned a proof for 27 November 2019 and a pre-proof and a Rule 18.3 hearing to call before me on 29 October 2019. As the defender was a party litigant, I explained the procedure involved and I encouraged her to seek legal advice in light of the serious consequences for her, were the court to grant the orders sought by the pursuer. I explained to the defender that the costs of the court proceedings and the aborted marketing attempts in relation to the property were likely to have a significant detrimental impact upon the extent of the net free proceeds.

[13] On 9 October 2019, the pursuer lodged a Minute of Amendment seeking *inter alia* an order in terms of section 14(2)(d)(i) of the 1985 Act suspending the defender's occupancy rights and an order requiring her to immediately vacate the property, failing which warrant to sheriff officers to immediately enter the property and summarily eject the defender. The pursuer also sought warrant to the sheriff clerk to execute a disposition in relation to the sale of the property. The defender lodged a note which, in order to expedite matters, I was prepared to accept as her Answers, notwithstanding that matters of relevancy arose in respect of some of the issues set out in her note.

[14] At the pre-proof hearing and Rule 18.3 Hearing on 29 October 2019, I invited the defender to lodge a statement which could be used as her evidence in chief to assist her during the proof. The pursuer was instructed to lodge affidavits as substitute for evidence in chief in respect of all of his witnesses.

The evidence

The pursuer's evidence

[15] The evidence was in short compass. The pursuer and Mr Scullion had lodged affidavits and were also cross examined. An affidavit sworn by the pursuer's partner, Ms Bates was also lodged. The defender agreed her evidence and accordingly, Ms Bates did not attend for cross examination.

[16] The pursuer spoke to the date upon which the parties separated. He explained that the matrimonial assets consisted of (a) the property purchased on 1 December 2008 for £127,500 (b) the contents valued at £10,000 and (c) his pension with the Armed Forces Pension Scheme which had an apportioned value of £28,638.70 for the period of the parties' marriage. The matrimonial debts consisted of (a) a joint mortgage secured over the property with an outstanding balance as at 19 May 2015 of £101,984.11 (b) an outstanding balance on the loan obtained from the pursuer's employer in the sum of £6,941.42 (c) an outstanding bank loan in the sum of £14,345.55 and (d) council tax arrears of approximately £5,500. He explained that from the date of separation to July 2014, he made monthly payments of the mortgage in the total sum of £14,242.98.

[17] The pursuer spoke to the circumstances in which the parties came to agree the terms of the Agreement. He explained that he had been seeking to have the property sold in terms of the Agreement since 2015 and that he was unable to obtain secured borrowing to purchase a property with his partner until matters were resolved. He spoke to what he regarded as deliberate attempts by the defender to frustrate the sale process and to her refusal to allow access to the property by selling agents until 2019. He spoke to having consented to the sale of the property by the secured lenders and to being unaware that notwithstanding decree being granted on 2 September 2016 requiring the defender to vacate

the property for a sale by the lender, the defender had come to an arrangement with the lender in respect of a payment plan for the mortgage arrears. He explained that he had not been consulted in relation to that arrangement which left him with title to the property and liability in respect of any further arrears.

[18] The pursuer stated that the defender had "wilfully and deliberately obstructed the sale" of the property and made "an entire mockery of court orders". He explained that previous selling agents appointed by the court had required to withdraw from acting because of the defender's failure to co-operate. He spoke to the defender's failure to sign a disposition and her refusal to vacate the property prior to the date of entry agreed with purchasers, causing the purchasers to move into rental accommodation at short notice; to his belief that unless the defender's occupancy of the property was regulated, she would never remove from the property; and to the cost to him of the present proceedings and the borrowings which had been necessary to pay legal fees.

[19] The defender's cross examination of the pursuer was limited to questions relating to his understanding of the sums he would receive upon the sale of the property. The pursuer explained that he could not state exactly what he would receive because the costs of the conveyancing and marketing would require to be deducted but he understood that he would receive half of the net free proceeds. He doubted that there would be any net free proceeds now remaining, because of the aborted sale costs.

[20] Mr Scullion is a solicitor instructed by the court to act in the sale of the property. Mr Scullion spoke to his careful attempts to identify an estate agent whom he believed could offer a more personal service to the defender and could communicate with her constructively and with empathy in order to progress the sale of the property. He explained that in normal circumstances, sellers are highly motivated to sell a property and there is a

high level of communication and co-operation between sellers and agents. He explained that dealing with the pursuer had been very easy; he was a willing seller who did as asked of him. However, he explained that the defender was motivated to buy the property, not to sell it. Her levels of communication were very good while she sought information in relation to how she might offer to purchase the property. He agreed to provide her with the home report and to afford her a protected period of 10 days in which to submit an offer. He spoke to a further period in which he assisted her and answered her queries to enable her to submit an offer. However, when she failed to submit an offer, engagement ceased and she refused to co-operate with the sale. He explained that solicitors previously appointed by the courts had obtained an offer for the property in the sum of £140,000. He had obtained an increased offer of £142,000 with a date of entry of 26 September 2019. He had negotiated a late date of entry to provide the defender with ample time to secure alternative accommodation.

[21] Mr Scullion spoke to the defender's failure to confirm when she would vacate the property or when she would sign a disposition transferring her title, despite repeated requests and notwithstanding her previous assurances that she would co-operate with the sale. He spoke to personally attending at the property on 25 September 2019 and being advised by the defender that she would not sign the disposition. He explained that the purchasers were an elderly couple who had sold their property, re-directed their mail, arranged removal of their possessions and had thereafter required to find alternative temporary accommodation. He was clear that the reason the property could not be sold was the defender's failure to vacate the property and execute the disposition. He explained that he had tried to build a rapport with the defender based on trust and honesty but he had found it exhausting and could no longer trust any commitment she made. He could not

now market the property based on any assurances that she may provide and court orders were necessary.

[22] During cross examination, Mr Scullion confirmed that the defender had asked him for information on the value of her equity in the property. He explained that he was unable to provide a figure but that he had confirmed to the defender that she was due to receive one half of the free proceeds after deduction of the sums due to the secured lender, the costs of the sale and any other sums which the parties had agreed to deduct; he had explained to the defender that he could not tell her the costs involved in the sale until after the sale had completed. The defender put a series of questions to Mr Scullion in relation to her desire to purchase the property. She put it to Mr Scullion that she could not obtain borrowing without knowing what she might expect as her share of the equity in the property. Mr Scullion explained that the defender was aware of what had been agreed to be deducted from the net free proceeds and could obtain updated redemption figures from the secured lender. This was a relatively simple arithmetic exercise which she could complete. He could not provide her with details of the costs of the sale of the property in advance because much depended upon her level of co-operation and any unanticipated expenses, such as the cost of cleaning the property after she had vacated it. Additionally, much depended upon the price she may be willing to offer to purchase the property and no formal offer had been received from her.

[23] In her affidavit, Ms Bates, the pursuer's partner, confirmed that the parties separated in August 2012, that they have not lived together nor had marital relations since and that there was no prospect of a reconciliation. She also spoke to being required to take loans personally to assist the pursuer with the costs of these proceedings. She spoke to her

eagerness to purchase a home with the pursuer; however, they could not do so until the property is sold.

The defender's evidence

[24] The defender and her father gave evidence and were invited to lodge written statements in advance to assist the defender in the presentation of her case.

[25] Regrettably, much of what is stated in the defender's written statement is either irrelevant or had no basis on record. The defender made a series of allegations in relation to the conduct of each of the professionals engaged by the pursuer or appointed by the court; she accused the pursuer and members of his family of intimidating and abusing her; she made repeated references to extra judicial discussions of settlement; she posed a series of questions which she did not answer; she accused the pursuer of adultery.

[26] The defender insisted that only she had adhered to all of the requirements of the Agreement. She stated that she had paid £17,754 in mortgage payments after the pursuer ceased making payments, without which the property would have been re-possessed. She explained that she was currently paying £684 per month in respect of the mortgage. She insisted that she had made reasonable offers to purchase the property and that the pursuer did not accept her offer because he was determined to see her homeless. She stated that she had been left with the care of the parties' dogs and the costs of upkeep of the property including council tax and utility bills. She explained that she was currently on sick leave owing to the stress caused by these proceedings and the proceedings instigated by the secured lender.

[27] During her examination in chief, she spoke to her efforts to resolve the parties' financial affairs by making numerous offers to purchase the property. She stated that she

had been denied an opportunity to purchase the property. She was adamant that she had provided proof that she was able to purchase the property however she was unable to refer the court to any offer of mortgage.

[28] Upon cross examination, it was put to her that she had in fact been offered a number of opportunities, notwithstanding the terms of the Agreement, to provide proof of funding and a written offer to purchase the property and that she had failed to do so. The defender insisted that she required to let the bank know the value of her share of the equity in the property before she could obtain an offer of mortgage. She blamed the pursuer's agents for their failure to provide her with details of her share of the net free proceeds. She stated that she did not agree to Mr Scullion placing the property on the open market and did not agree that he was authorised to act in the sale. She claimed that in the event that she were ordered to vacate the property, she would be rendered homeless.

[29] The defender's father, Mr Young, explained in his statement that he became involved when his daughter sought assistance from him in August 2016. He spoke to meeting with the secured lender and agreeing a repayment plan in respect of mortgage arrears. He also spoke to the effect of the proceedings upon the defender and the likely effects upon her were the court to suspend her occupancy rights. He spoke to his efforts to assist the defender in purchasing the pursuer's title to the property. He spoke to his belief that the pursuer wished to see the defender homeless and that she indeed would be homeless in the event of her occupancy rights being suspended.

[30] In his statement he made extensive references to extra judicial discussions between the parties and to allegations in relation to the conduct of the professionals engaged by the pursuer, both of which matters were irrelevant to the issues before the court.

[31] Upon cross examination, he confirmed that he only became aware of the defender's predicament in 2016 and had no knowledge of the terms of the Agreement. It was put to him that the pursuer would have been prepared to transfer his title to the property if the defender had been able to secure borrowing to purchase his title. He was asked whether the defender had secured a mortgage. He responded 'she could have'. He appeared to be unaware that that the court had ordered the sale of the property. He claimed that the property had been placed on the open market without the defender's knowledge.

[32] He confirmed that if the defender is required to vacate the property, she will move into rental accommodation. He described this as 'Plan B' and claimed that there were a series of alternative plans for the defender's accommodation.

Submissions

[33] On behalf of the pursuer, Mr Smith submitted that the circumstances of this case were so unique that he could not offer any authority to the court, beyond referring to the terms of section 14 of the 1985 Act and the range of incidental orders which could be granted in terms thereof. He submitted that the only means of bringing these long running proceedings to an end was for the court to now grant decree of divorce and grant the orders under section 14 to require the defender to now implement the terms of the Agreement which she had signed with the benefit of legal advice. Various orders had already been granted by the court but the defender had sought to frustrate the sale of the property. He submitted that the defender's suggestion that she could not consent to the sale without knowing exactly what her share of the equity would be, was simply another means by which she sought to delay and frustrate the sale. He explained that the pursuer did not seek to suspend the defender's occupancy of the property lightly. Notwithstanding the terms of

the Agreement, he had continued to offer the defender opportunities to present him with an offer to purchase his title in the property, provided she was able to confirm that she has secured borrowing to enable her to do so. She had been unable to do so. He commended the pursuer and his witnesses as credible and reliable. He invited the court to conclude that the defender's evidence lacked credibility and that her father's evidence was largely based upon information she had imparted to him.

[34] Mr Smith sought the expenses of the cause insofar as not already dealt with, in favour of the pursuer from the date of registration of the Agreement in January 2016. The defender's conduct, her defiance of court orders, her failure to sign a disposition and the repeated court hearings which had been necessary to seek to regulate her conduct, justified a departure from the norm of each party bearing their own expenses in divorce proceedings. He invited the court to find the defender liable for the costs of the aborted sale, including Mr Scullion's fees and he sought an additional fee of 25%.

[35] The defender submitted that she had asked repeatedly for the sums which would be payable to her upon the sale of the home. She suggested that had those sums been made available she would have been able to demonstrate that any offer she may have made would have been more lucrative to the pursuer. She submitted that she had a good working relationship with the mortgage provider and she would be able to secure funding. She made a passionate and emotional plea to be permitted to remain in the property with her dogs. She repeated that she remained prepared to purchase the pursuer's title and take on the mortgage. She submitted that she had complied with all aspects of the Agreement. Finally, she opposed the pursuer's motion for expenses. She submitted that the pursuer chose to return repeatedly to court when she had sought to negotiate an outcome whereby she could remain in the property.

Discussion

Assessment of the evidence

[36] I found each of the pursuer's witnesses credible and reliable. Mr Scullion and the pursuer gave evidence in a straightforward and honest manner. Each sought to assist the court. Very little of their evidence was in fact challenged by the defender on cross examination. Notwithstanding the defender's desire to portray the pursuer as being motivated by a desire to 'see her homeless', I did not form that impression. It was clear that the pursuer was not motivated by vengeance or spite but rather wished to implement the terms of the Agreement, sell the property, be free of his obligations to the secured lender and be in a position to purchase a property with his partner.

[37] I regret that I found the defender's evidence confused and contradictory and on a number of issues lacking credibility. On the one hand, she claimed that she "respected" the Agreement and accepted its terms. She repeatedly claimed to be the only person who had adhered to its terms. On the other hand she appeared to continue to challenge it. She maintained, contrary to the clear terms of the document, that the Agreement allowed her to purchase the property. She denied that she had agreed that the property would be placed on the open market if it were not accepted to the mortgage to rent scheme. She then alleged that she had never seen the copy of the Agreement lodged with process and that she thought she had signed 'divorce papers'. At one stage she claimed that she did not sign the document at all then later accepted that she had. I regret I found this chapter of her evidence incredible.

[38] The defender repeatedly claimed that the secured lender had agreed that she could obtain borrowing to purchase the pursuer's share of the property, however no offer of mortgage was placed before the court; there was no evidence that any such offer had been

exhibited to the pursuer since 2015. She then claimed that she had been unable to obtain such an offer because the lender required to know a precise sum for her share of the equity of the property. Again, no confirmation of what information, if any, had been required by the lender was placed before the court. It was clear that a cash statement detailing the funds due to her upon the sale of the property had been provided to her in February 2018 (item 6/1/8 of process). In any event, she was able to estimate what might be the net free proceeds as a simple arithmetical exercise. In my judgment, her need to obtain a note of the equity due to her was another attempt to stall the sales process and provide justification for her unreasonable conduct. She claimed that she had not been given an opportunity to make an offer to purchase the pursuer's title in the property. That was manifestly untrue. Despite her repeated claims to the contrary, it was clear that no formal written offer to purchase the property had been made by her, or on her behalf.

[39] The defender's claims that her removal from her home would render her homeless were contradicted by her father who readily accepted that plans were in place to secure alternative accommodation. She has the means and the resources to secure alternative accommodation; she is in employment and has been able to pay £684 per month in mortgage repayments.

[40] Mr Young's evidence was of limited assistance and was a reflection of what he had been told by the defender. He spoke to his belief that the pursuer desired to see the defender homeless, yet he stated that he had in fact never met the pursuer. He claimed that the property had been placed on the open market without the defender's knowledge. That was patently untrue.

[41] Where the defender or Mr Young's evidence was contradicted by the evidence of the pursuer or his witnesses, I have preferred the latter.

The orders sought by the parties

[42] The present case presents a most unusual set of circumstances. The parties have entered into an Agreement in terms of clause 7 of which both parties:

> "renounce and discharge all and any rights they have or may have against the other or against the executors or assignees of the other now and in all time coming to any capital sum, property transfer order or aliment for him or herself or periodical allowance of any kind whether under Common Law or Statute either on divorce or death and without prejudice to the foregoing generality, any claim in terms of the Family Law (Scotland) Act 1985 or any amendment or re-enactment of that Act and the Family Law (Scotland) Act 2006 . . . they agree that this Agreement represents a full and final settlement of all financial claims arising from the breakdown of their marriage".

[43] In terms of clause 8 of the Agreement, the parties agreed that:

> "The [pursuer] had raised an action of divorce at Glasgow Sheriff Court under reference F670/15. Following upon signature by both parties of this document and confirmation of its subsequent registration having been received the [defender] will withdraw her defence to those proceedings and will confirm that the action to proceed as undefended and thereafter the [pursuer] will proceed in respect of the crave for divorce only with no finding of expenses."

[44] The defender has not withdrawn her defence to these proceedings in terms of clause 8 of the Agreement. The only outstanding issue is the question of the disposal of the property. The defender ultimately accepted that the Agreement regulates the financial affairs of the parties arising from the breakdown of their marriage. She did not insist upon her craves for financial provisions and she has no crave seeking a property transfer order. Indeed, she has renounced any claim to any such orders in terms of clause 7 of the Agreement.

[45] The first question upon which I require to satisfy myself is the competency of the orders sought by the pursuer, a matter upon which neither party addressed the court. Can the court grant an order under section 14 of the 1985 Act in an action for divorce, where the

parties have entered into a minute of agreement? Can the pursuer seek incidental orders under section 14 in the absence of any other orders under section 8 of the 1985 Act?

The applicable law

[46] Section 8 of the 1985 Act, insofar as relevant, provides as follows:

> "8. Orders for financial provision
>
> (1) In an action for divorce, either party to the marriage and in an action for dissolution of a civil partnership, either partner may apply to the court for one or more of the following orders—
>
> (a) an order for the payment of a capital sum to him by the other party to the action;
> (aa) an order for the transfer of property to him by the other party to the action;
> (b) an order for the making of a periodical allowance to him by the other party to the action;
> (baa) a pension sharing order;
> (bab) a pension compensation sharing order;
> (ba) an order under section 12A(2) or (3) of this Act;
> (bb) an order under section 12B(2);
> (c) an incidental order within the meaning of section 14(2) of this Act.
>
> (2) Subject to sections 12 to 15 of this Act, where an application has been made under subsection (1) above, the court shall make such order, if any, as is—
> (a) justified by the principles set out in section 9 of this Act; and
> (b) reasonable having regard to the resources of the parties.
>
> (3) An order under subsection (2) above is in this Act referred to as an *"order for financial provision"*."

Section 14 insofar as relevant provides as follows:

> "14. Incidental orders.
>
> (1) Subject to subsection (3) below, an incidental order may be made under section 8(2) of this Act before, on or after the granting or refusal of decree of divorce or of dissolution of a civil partnership.
>
> (2) In this Act, *"an incidental order"* means one or more of the following orders—
>
> (a) an order for the sale of property;
> (b) an order for the valuation of property;

> (c) an order determining any dispute between the parties to the marriage or as the case may be the partners as to their respective property rights by means of a declarator thereof or otherwise;
> (d) an order regulating the occupation of
> (i) the matrimonial home, or
> (ii) the family home of the partnership,
> or the use of furniture and plenishings therein or excluding either person from such occupation;
> (e) an order regulating liability, as between the persons, for outgoings in respect of
> (i) the matrimonial home, or
> (ii) the family home of the partnership,
> or furniture or plenishings therein;
>
> (f) . . . .
>
> (k) any ancillary order which is expedient to give effect to the principles set out in section 9 of this Act or to any order made under section 8(2) of this Act.
>
> (3) An incidental order referred to in subsection (2)(d) or (e) above may be made only on or after the granting of the decree."

[47] The pursuer seeks orders in terms of sections 8(1)(c), 14(2)(d)(i) and 14(2)(k) of the 1985 Act.

[48] Does the Agreement oust the jurisdiction of the court to grant the incidental orders sought? In my judgment, it does not.

[49] The defender ultimately accepted that she had signed the Agreement and was bound by its terms. Her motion to have the Agreement set aside on 20 June 2017 was refused in the absence of a relevant crave or relevant averments. She has not appealed that interlocutor nor sought to introduce the requisite crave for an order under section 16(1)(b) of the 1985 Act. She has had over two years in which to do so.

[50] In those circumstances, the terms of the Agreement bind the parties. The court's jurisdiction is effectively ousted in relation to the matters agreed by the parties. As observed by Lord Milligan in *Cunniff* v *Cunniff* 1999 SC 537 (at 549C-D):

> "The 1985 Act makes provisions to be applied in the absence of agreement between the parties as to financial matters arising on divorce. Ideally, the Act does not

> require to be used at all to achieve settlement of such financial matters. At worst, the Act requires to be used fully because the parties cannot agree on any aspect of such matters. Between these two extremes lie the cases, such as the present, where parties reach a measure of agreement whether in detail or in principle, and the court requires to apply the Act in determination of outstanding questions, properly taking into account in such determination such agreements as have been reached."

[51] In the present case, the parties have agreed to renounce and discharge their rights to any capital sum, property transfer order, aliment or periodical allowance and any claim in terms of the 1985 Act. Moreover, they concur that the Agreement "represents a full and final settlement of all financial claims arising from the breakdown of their marriage". What they have agreed is the division of matrimonial property; they have agreed settlement of their financial claims. To some extent, they have agreed the mechanics of implementing their agreement; they have agreed that they will co-operate fully with and facilitate any sale. However, they have not agreed how and when the defender's occupation of the property will end. They have not specified the need for vacant possession should she fail to co-operate with and facilitate a sale. Accordingly, neither party has, in my judgment, renounced a right to seek incidental orders in terms of section 14 of the 1985 Act in that regard. I am satisfied therefore that the parties have not disqualified the court's intervention to the extent of granting incidental orders which give effect to the terms of the Agreement, provided the requirements of section 8(2) are met.

[52] Neither party pursued their existing craves seeking capital sums or periodical allowances at proof, matters having now been agreed in terms of the Agreement. That being the case, can the court grant an incidental order in the absence of a principal order? In my judgment, it can.

[53] Section 8(1) of the 1985 Act sets out the type of orders ('orders for financial provision') parties may seek in an action for divorce or dissolution of a civil partnership.

Section 8(1) specifically enables a party to apply for *'one or more'* of the orders for financial provision. Those orders include "an incidental order within the meaning of section 14(2)". The term 'incidental' might ordinarily indicate that such orders are ancillary to, or an adjunct of, a principal order, however, the opening words of section 8(1) clearly indicate that an incidental order under section 14 can be granted as a stand-alone order, provided that the requirements of section 8(2) are met.

[54] As noted at paragraph 24.113 of Clive, *The Law of Husband and Wife in Scotland* (4th ed);

> "The term 'incidental' does not necessarily imply that there has to be a main order – for example, for payment of a capital sum or for transfer of property. It is just a label . . . and it is clear from paragraph (k) [of section 14(2)] that the order can be one which is expedient to give effect to the principles in section 9 even if there is no other order."

[55] Insofar as the learned Lord Cameron of Lochbroom noted in *Demarco* v *Demarco* 1990 SCLR 635 (at page 638) that "I would regard the phrase 'incidental order in the Act as meaning what is says, namely something done by way of an order incidental or ancillary to the making of an order under section 8(2) in relation to an order under section 8(1)(a) or (b)", his comments were clearly obiter.

[56] In *MacClue* v *MacClue* 1994 SCLR 933, Sheriff Principal Cox QC dealt with an appeal against a decision of a sheriff to grant a motion by the defender in a divorce action, seeking incidental orders to the effect that the matrimonial home should be advertised for sale. The pursuer had opposed the motion on the basis that it was incompetent, in the absence of a crave for financial provision. The Sheriff Principal allowed the appeal, holding that only a party seeking a financial provision is entitled to an incidental order in terms of section 14(2); the defender had no crave for financial provision or for the sale of the property. The learned Sheriff Principal noted that orders under section 14 of the 1985 Act "cannot be used merely

to enforce the common law right of a joint proprietor to sell the property held in common and divide the proceeds equally regardless of the other provisions of the Act". The Sheriff Principal expressly approved Sheriff Simpson's comments in *Reynolds* v *Reynolds* (Sh Ct) 1991 SCLR 174 at 176 B-C; "I do not think that I can grant an incidental order just to save the pursuer the trouble of raising a separate action for division and sale".

[57] It is not clear from the report of the decision, whether what the Sheriff Principal considered to be incompetent was the procedure adopted by the defender, namely, an application for orders under section 14 by motion (rather than by the introduction of a crave seeking an incidental order, being an order for financial provision in terms of section 8(2) and (3)), or whether he considered it to be incompetent for a party to seek an incidental order without any crave for a principal order.

[58] However, in *Jacques* v *Jacques* 1995 SC 327, the Inner House put the competency of seeking a 'stand-alone' incidental order beyond doubt. In that case, the pursuer craved a declarator that the matrimonial home was jointly owned and sought an order for its sale. The sheriff had formed the view that the matrimonial home should be sold and the proceeds shared equally but decided to refrain from making any incidental order, allowing the parties to realise the value of the home in accordance with the normal law of property. The Inner House held that it would have been competent for the sheriff to have granted the incidental orders sought by the pursuer.

[59] While neither *MacClue* v *MacClue* nor *Reynolds* v *Reynolds* was referred to in the decision of the Inner House, that decision is of course binding on this court. It also accords with my interpretation of section 8(2) at paragraph 53 above.

[60] Arguably, the pursuer could have sought to implement the terms of the Agreement by way of an action for division and sale. However, notwithstanding the comments made in

MacClue v *MacClue* or *Reynolds* v *Reynolds*, in the circumstances of the present case, in my judgment, the court requires to take a pragmatic and common sense approach. If the incidental orders sought by the pursuer are otherwise competent, the court should be slow to require the parties to face the daunting prospect of further court proceedings with the necessary additional financial and emotional costs such proceedings will inevitably entail, particularly where the court has already appointed a selling agent and ordered the sale of the property. As the Lord President, Lord Hope, noted in *Jacques* v *Jacques* (at page 332);

> "We see no advantage . . . in the sheriff's decision to leave it to the parties to resort to separate proceedings for a division and sale of the property if an agreed solution could not be worked out between them. It would have been preferable for him to give effect to the pursuer's crave for the necessary orders to be made in these proceedings, to avoid further expenses and delay in the working out of his decision that the property should be shared between the parties equally."

[61] Equally, I can see no advantage to requiring the parties to engage in further litigation if the incidental orders the pursuer seeks can be granted in these proceedings.

[62] Of course, the court must apply section 8(2) in deciding whether to grant an incidental order. Section 8(2) of the 1985 Act provides;

> "Subject to sections 12 to 15 of this Act, where an application has been made under subsection (1) above, the court shall make such order, if any, as is—
> (a) justified by the principles set out in section 9 of this Act; and
> (b) reasonable having regard to the resources of the parties."

Application of the law to the facts

[63] Should the orders sought by the pursuer be granted in this case?

[64] The parties agreed in terms of clause 10 of the Agreement that the "terms of settlement are fair and reasonable". In my judgment, the court could be satisfied, in terms of section 8(2), that an incidental order which seeks to implement the terms of that Agreement

is justified by the principles set out in section 9 and is reasonable having regard to the parties' resources.

[65] However, even if I am wrong to approach matters thus, I am satisfied based on the evidence before me, that the incidental orders sought by the pursuer can be granted in terms of section 8(2) of the 1985 Act.

[66] There were no averments which might justify a departure from the principle that the net value of the matrimonial property as at the date of separation was to be shared equally between the parties in terms of section 9(1)(a). No evidence of any special circumstances was led. The only evidence led in relation to the matrimonial assets and liabilities was that of the pursuer. The defender did not challenge it. In terms of the evidence led, the matrimonial assets consisted of the property, the contents of the property and the pursuer's pension, amounting to approximately £178,000. The matrimonial debts consisted of the secured loan over the property, the pursuer's loans from his employer and a further bank loan and council tax arrears, totalling approximately £122,200. The parties had agreed that the pursuer would retain his pension and sole liability for his loan from his employer and from the bank. The parties had agreed that liability for council tax and any outstanding utility bills in respect of the property as at the date of separation would be equally borne by being deducted from the proceeds of sale of the property. The parties had already agreed which items of the contents of the property would be uplifted by the pursuer. Taking a broad and practical approach, an outcome which (a) left the pursuer with his pension but also with most of the matrimonial liabilities (excluding the mortgage) (b) required the property to be sold and the net free proceeds divided equally (under deduction of *inter alia* the council tax and liability for utilities) was justified by the principles set out in section 9 of the 1985 Act and reasonable having regard to the resources of the parties. An incidental

order in terms of section 14 which gives effect to that outcome is also justified and reasonable. Neither party appears to be in a position to purchase the other's *pro indiviso* title to the property.

[67] The pursuer explained that he had paid £14,242 in mortgage repayments from the date of separation until July 2014 during a time when the defender was in sole occupation of the property. The defender explained that she had paid £17,754 to the lender since July 2014 to prevent the property being repossessed. She also explained that she continues to pay £684 per month in respect of mortgage repayments. The defender appeared to suggest that her payment had benefitted the pursuer and required to be taken into account. However, the pursuer had consented to decree passing in respect of the proceedings at the instance of the secured lender and he had not been consulted on, nor been made aware of, any payments by the defender to prevent the property being repossessed. He had made payments on the mortgage for almost two years to allow the defender to continue to occupy the property. The payments made by the defender thereafter were made at her own risk, over a period during which she was aware that she had agreed to a sale of the property (in terms of the Agreement); the payments were made for her own benefit, namely to allow her to continue to occupy the property. Had she vacated the property she would have required to incur the costs of alternative accommodation in any event. I do not regard it as necessary to take any of the payments made by either party into account in determining whether incidental orders ought to be granted.

[68] The defender made a number of impassioned pleas to be allowed to continue to occupy the property and to be permitted to purchase it. She has already agreed to sell the property and forgo her claim to a property transfer order and in any event, regrettably, it is

clear from the evidence before me that she is not in a position to secure funding for the purchase of the pursuer's title to the property.

[69] Accordingly, I am satisfied that the incidental orders sought by the pursuer are competent, justified by the principles set out in section 9 of the 1985 Act, reasonable having regard to the parties resources and ought to be granted.

Decision

[70] I will grant decree of divorce in terms of the pursuer's first crave. I will grant the orders sought by the pursuer in terms of section 14(2)(d)(i) and 14(2)(k) of the 1985 Act. Incidental orders for the sale of the property, appointment of selling agents and for access for viewing by prospective purchasers already having been granted by the court, they remain extant.

[71] I will supersede extract for a period of six weeks to allow the defender time to make arrangements for alternative accommodation.

[72] I was addressed on the issue of expenses. Having regard to the defender's conduct which has necessitated repeated court hearings and has caused aborted sales of the property, it is appropriate to find her liable in the expenses of the cause from the date of the registration of the Agreement as taxed. It is also appropriate to make an order that the costs of the aborted sale negotiated by Mr Scullion be deducted from defender's share of the net free proceeds of the sale of the property, in terms of section 14(2)(k) of the 1985 Act. An additional fee of 25% was sought by the pursuer. Having regard to factors (i), (v) and (vii) of the Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment and Further Provisions) 1993, Schedule 1 Regulation 5(b), I will grant an additional fee of 10%. Having found the defender liable in the expenses of the cause from the date of registration of the

Agreement and liable for the expenses of the aborted sale, to grant an additional fee greater than 10% would in my judgment be punitive.